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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	98-161
	)	
BellSouth Telecommunications, Inc.	)	BellSouth Trans. No. 476
BellSouth Tariff FCC No. 1	)	
	)	
To: Competitive Pricing Division	)	

PETITION TO REJECT, OR TO SUSPEND AND INVESTIGATE, OF NORTHPOINT COMMUNICATIONS, INC.

Pursuant to 47 U.S.C. § 204(a), NorthPoint Communications, Inc.,[1] respectfully requests that this Commission reject BellSouth Telecommunications Inc.'s ("BellSouth") Transmittal No. 476 (Aug. 18, 1998) in which BellSouth proposes to modify its Tariff F.C.C. No. 1 to introduce Asymmetrical Digital Subscriber Loop ("ADSL") services. Alternately, the Commission should suspend and investigate the tariff.

The Communications Act requires that "[a]ll charges, practices, classifications, and regulations for and in connection with any … communications service shall be just and reasonable." 47 U.S.C. 201(b). BellSouth's proposed ADSL Tariff fails to satisfy this requirement.

Pursuant to its proposed tariff, BellSouth plans to offer at prices as low as $29 per month (with a nonrecurring charge of $100.00). See BellSouth's proposed Tariff F.C.C. No. 1, Original Pages 7-156.93. It appears that these prices do not cover BellSouth's forward-looking, long-run incremental costs of providing the service. In any case, the

[1] NorthPoint is a competitive local exchange carrier ("CLEC") currently providing DSL service in California and Massachusetts. NorthPoint is certificated or has pending CLEC applications in twenty states,

proposed price is so low that competitors such as NorthPoint would face a price squeeze given the prices that they must pay to BellSouth for the unbundled network elements necessary to provide competing services. Allowing this price squeeze would severely restrict consumers' ability to choose among competing xDSL providers and would be contrary to the public interest. Accordingly, the Commission should suspend BellSouth's tariff and initiate an investigation into the lawfulness of the rates contained therein.

I. BELLSOUTH'S PROPOSED ADSL TARIFF WOULD CREATE AN ANTICOMPETITIVE PRICE SQUEEZE.

A price squeeze exists whenever a competitor that is equally efficient at providing the competitive portions of a service cannot, without losing money, meet the incumbent's price given the price(s) that it must pay to the incumbent for any bottleneck input(s) available only from the incumbent. A price squeeze can be the result of the markup over direct economic cost that the incumbent imposes for bottleneck inputs that both it and the competitor use or the incumbent's imposition of costs on the competitor that the incumbent does not bear at all. To avoid a price squeeze, the incumbent's price must equal or exceed the sum of the price that it charges to competitors for the bottleneck input(s) plus the total service long-run incremental cost of the competitively provided portions of the service. This rule is known as the "imputation" rule because the incumbent must "impute" the price(s) of the bottleneck input(s) into the price of its

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and will soon initiate service in New York. NorthPoint has interconnection agreements with several incumbent local exchange carriers ("ILECs"), including BellSouth.

competing service. As this Commission has previously found, "... an imputation rule could help detect and prevent price squeezes ...."[2]

A. BellSouth Has Failed to Impute the Price of Necessary Inputs.

BellSouth's ADSL tariff does not include the unbundled network element charges that BellSouth charges to its CLEC customers. In fact, BellSouth's total $29 price appears to be less than the wholesale costs charged by BellSouth to competing CLECs for the loops and collocation necessary to provide DSL service. Clearly, competition cannot develop where the price of CLEC wholesale inputs is greater than the rates of BellSouth's ADSL service.

For example, BellSouth charges a non-recurring cost of $280.15 for an ADSL loop in North Carolina, almost 200% more than the non-recurring charge for BellSouth's ADSL service. In addition, BellSouth charges $17 in monthly recurring charges to CLECs for unbundled loops, and no similar charge appears to be reflected in BellSouth's proposed ADSL tariff.[3]

BellSouth's proposed tariff also fails to properly account for collocation charges. In North Carolina, for example, NorthPoint has paid BellSouth up to $44,360 non-recurring charge for a single central office collocation cage (as well as a $3,850 application fee). In addition, BellSouth charges NorthPoint and other competitive xDSL providers for DC power, cable space, cable placement and access cards. None of these

[2] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd. 15499 (Aug. 8, 1996) ("First Interconnection Order"), ¶848.

[3] In other words, although BellSouth's proposed ADSL service relies on BellSouth's own joint use of the same loop it uses to provide basic exchange service, BellSouth does not attribute any of the cost of the loop itself to its ADSL service. BellSouth's intention to provide its own ADSL service a "free ride" on its bottleneck loop facilities is obviously improper and will necessarily create a price squeeze for alternative xDSL providers, such as NorthPoint, that require the use of BellSouth's unbundled loop and incur the corresponding cost of that loop to provide service.

charges appear to be imputed in BellSouth's proposed rates for its own ADSL service. There appears to be no basis for this Commission to determine, based on the limited information in BellSouth's tariff and the absence of a full record, that BellSouth's proposed $29 ADSL rate even begins to cover the loop and collocation rates it charges to DSL competitors, let alone proper overhead and profit allocations.[4] BellSouth's proposed tariff thus creates an anticompetitive price squeeze on competing xDSL providers. Permitting BellSouth's ADSL Tariff to take effect without addressing the ways in which BellSouth can abuse its control over these bottleneck inputs would stifle emerging competition for data communications, particularly in the small business and residential markets, and frustrate this Commission's goal of promoting robust competition in broadband services.

B. Jurisdictional Issues Complicate the Analysis Of BellSouth's ADSL Tariff.

While BellSouth has chosen to file its ADSL Tariff as an interstate service, at present, only the State commissions are reviewing the prices, terms and conditions for the unbundled network elements CLECs need to offer xDSL services. This split jurisdiction greatly complicates the analysis of price squeeze issues and the application of the imputation rule.

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[4] Nor do BellSouth's proposed ADSL rates appear to recover several other significant cost components faced by any DSL service provider. For example, as set forth in the BellSouth ADSL tariff, BellSouth's planned ADSL service requires that ADSL equipment be placed on the central office end of an existing local loop and that the traffic be delivered to an aggregation point designated by BellSouth. See Revised Page 7-58.14. The equipment placed in a Central Office referenced by BellSouth costs tens of thousands of dollars. The transport (e.g., DS3s) referenced in BellSouth's tariff necessary to carry DSL traffic out of the Central Office to the BellSouth Exchange Access Asynchronous Transfer Mode Service also costs thousands of dollars.

In its First Interconnection Order, this Commission deferred application of an imputation rule to the states.[5] That decision, however, dealt with the FCC's prescription of pricing rules for unbundled network elements when the states were determining the pricing for local exchange services. Here, the circumstances are reversed. As the regulatory body charged with reviewing the lawfulness of the proposed rates, it falls to the FCC to apply an imputation rule so as to prevent anti-competitive pricing practices such as price squeezes. Ideally, of course, the FCC and state regulators would work closely together to coordinate pricing of the incumbent's ADSL service and of the wholesale elements that CLECs must acquire from the incumbent to provide competitive alternatives to that service. In the absence of an explicit process for such coordination, the FCC will lack access to the relevant information concerning the rates for unbundled network elements and will be unable to conduct a proper imputation analysis. Thus, the FCC must either compare BellSouth's proposed tariff to the prices for unbundled network elements in each BellSouth State, or defer the issue to the state commissions. Under such circumstances, it would be best for the ADSL tariff to be filed as an intrastate service offering and evaluated by state regulators. See Order Designating Issues for Investigation, GTE Telephone Operators GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC No. 98-79 (CCB, Aug. 20, 1998).

II. BELLSOUTH'S PROPOSED ADSL TARIFF IS INADEQUATE.

To date, NorthPoint has only been able to review BellSouth's description of its supporting cost data, and not the cost data itself. BellSouth has provided absolutely no

[5] First Interconnection Order at ¶ 850 ("While an imputation rule may be pro-competitive, we will leave the implementation of such rules to individual states for the time being.")

details as to what costs are included in its cost study. The inadequacy of BellSouth's cost support for its proposed ADSL Tariff thus is itself sufficient basis for rejecting that tariff.

While the cost support study is inadequate to support BellSouth's filing, the information provided suggests that BellSouth's proposed rates for ADSL service do not cover its costs of providing the service. As explained above, BellSouth's proposed tariffed rates – which run as low as $29 -- do not appear to cover the cost of an unbundled loop plus collocation, let alone the costs of the equipment and transport required to provide DSL and properly allocated overhead costs. When these component costs are compared to BellSouth's proposed rates using the available information, BellSouth's proposed rates appear to be significantly below cost. Accordingly, this Commission should reject BellSouth's proposed tariff, or, in the alternative, suspend it pending further investigation.

CONCLUSION

It is critical at this nascent stage of xDSL competition that BellSouth not be allowed to establish below-cost rates that would stifle competition. NorthPoint and other xDSL CLECs have built a business on delivering cost-effective data solutions to small business and residential users at prices well below ILEC T1 rates. Although NorthPoint shares a strong commitment to lower-cost data alternatives, it is aware of no legitimate public interest in below-cost pricing that stifles the development of vigorous competition. Alternatively, if BellSouth's ADSL rates reflect its true costs of providing service, then the input prices BellSouth imposes on competing xDSL CLECs are excessive and must be reduced.

Whether BellSouth is engaged in below-cost pricing of its ADSL service or above-cost wholesale pricing of unbundled network elements, BellSouth's ADSL Tariff cannot be allowed to go into effect. Accordingly, NorthPoint respectfully requests that this Commission reject BellSouth's ADSL Tariff and initiate an investigation to gather all information necessary to verify the lawfulness of the rates contained therein.

Respectfully submitted,

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